Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

KEVIN MARK ABELA,

Petitioner,

vs.

STATE OF MICHIGAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE 6TH CIRCUIT COURT FOR OAKLAND COUNTY, MICHIGAN

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42 pp

QUESTIONS PRESENTED

Petitioner Kevin Abela was convicted of manslaughter, after stabbing an individual who was part of a group assaulting Petitioner. The questions presented are:

QUESTION 1: WHETHER DEFENDANT'S STATEMENT TO POLICE WAS INVOLUNTARY AND INADMISSIBLE WHERE THE POLICE ADMITTED THAT WHEN THEY BEGAN QUESTIONING, DEFENDANT REQUESTED AN ATTORNEY.

QUESTION 2: WHETHER DEFENDANT'S STATEMENT TC POLICE WAS INVOLUNTARY AND INADMISSIBLE WHERE DEFENDANT WAS SERIOUSLY INJURED AND UNDER THE INFLUENCE OF ALCOHOL AND PAIN MEDICATION GIVEN HIM BY THE DOCTOR.

QUESTION 3: WHETHER THE PROSECUTOR UNFAIRLY PREJUDICED DEFENDANT BY MAKING UP FACTS IN HIS ARGUMENT.

QUESTION 4: WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING TO THE IMPROPER ARGUMENT.

QUESTION 5: WHETHER APPELLATE COUNSEL WAS INEFFECTIVE, WHERE HE DID NOT ORDER A

RELEVANT TRANSCRIPT, AND WAS THUS HAD NO RECORD AND PRESENTED NO ARGUMENT CONCERNING THE MOST IMPORTANT ISSUES IN THE CASE.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
INDEX OF AUTHORITIES	iv
OPINIONS BELOW	2
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
FACTS CONCERNING THE INCIDENT	5
FACTS CONCERNING THE PETITIONER'S STATEMENT TO POLICE	7
REASONS FOR GRANTING THE WRIT	11
QUESTION I	11
QUESTION II	14
QUESTION III	16
QUESTION IV	22
QUESTION V	23
CONCLUSION	30
APPENDIX	A1
Order of Circuit Court denying motion, Oct. 22, 1996	A1
Order of Michigan Court of Appeals denying leave, July 22, 1996	A3
Order of the Michigan Supreme Court denying leave May 28, 1998	A4

INDEX OF AUTHORITIES

Cases

Amadeo v. Zant, 486 U.S. 214; 108 S.Ct. 1771;
100 L.Ed.2d 249 (1988) 29
Arizona v. Fulminante, 499 U.S. 279; 111 S.Ct. 1246;
113 L.Ed.2d 302 (1991) 13
Beasley v. United States, 491 F.2d 687
(6th Cir. 1974) 22, 26, 27
Berger v. United States, 295 U.S. 78; 55 S.Ct. 629;
79 L Ed 1314 (1935) 19, 20
Brown v. Illinois, 422 U.S. 590; 95 SCt 2254;
45 LEd2d 416 (1975) 15
Brown v. State of Mississippi, 297 U.S. 278; 56 S.Ct. 461;
80 L Ed 682 (1936) 16
Corsa v. Anderson, 443 F. Supp. 176 (E.D. Mich. 1977) 23
Crisp v. Duckworth, 743 F.2d 580 (7th Cir. 1983) 26
Davis v. Alaska, 415 U.S. 308; 94 S.Ct. 1105;
39 L.Ed.2d 347 (1974) 20
Edwards v. Arizona, 451 U.S. 477; 101 S.Ct. 436;
68 S.Ct. 378 (1981) 11
Evitts v. Lucey, 469 U.S. 387; 105 S.Ct. 830;
83 L.Ed.2d 821 (1985) 26, 28
Gray v. Greer, 800 F.2d 644 (7th Cir. 1986) 27, 28
Hollenback v. United States, 987 F.2d 1272
(7th Cir. 1993) 28
House v. Balkcom, 725 F.2d 608 (11th Cir. 1984) 26
Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308,

77 L.Ed.2d 987 (1983) 24, 27
Kowalak v. United States, 645 F.2d 534 (6th Cir. 1981) 23
Lee v. Illinois, 476 U.S. 530; 106 S.Ct. 2056;
90 L.Ed.2d 514 (1986) 20
Lego v. Twomey, 404 U.S. 477; 92 S.Ct. 619;
30 L.Ed.2d 618 (1972) 14
Mason v. Hanks, 97 F.3d 887 (7th Cir. 1996) 27, 28, 29
Mincey v. Arizona, 437 U.S. 385; 98 SCt 2408;
57 LEd2d 290 (1978) 16
Miranda v. Arizona, 384 U.S. 436; 86 S.Ct. 1602;
16 L.Ed.2d 694 (1966) 8, 12
Murray v. Carrier, 477 U.S. 478; 106 S.Ct. 2639;
91 L.Ed.2d 397 (1986) 28
Neally v. Cabana, 764 F.2d 1173 (5th Cir. 1985) 26
Penson v. Ohio, 488 U.S. 75; 109 S.Ct. 346;
102 L.Ed.2d 300 (1988) 26
People v. Anderson (After Remand), 446 Mich. 392 (1994) . 13
People v. Cipriano, 431 Mich. 315 (1988) 15
People v. Ginther, 390 Mich. 436 (1973) 23
People v. Rosales, 160 Mich. App. 304 (1987) 20
People v. Strong, 404 Mich. 357 (1978) 20
People v. Budzyn, 456 Mich. 77 (1997) 21
People v. Ellison, 133 Mich. App. 814 (1984) 20
People v. Fisher, 193 Mich. App. 284 (1992) 20
People v. Reed, 449 Mich. 375 (1995) 24
People v. Sterling, 154 Mich. App. 223 (1986) 20
Rushen v. Spain, 464 U.S. 114; 104 S.Ct. 453;
78 L.Ed.2d 267 (1983) 23, 29

Schneble v. Florida, 405 U.S. 427; 92 S.Ct. 1056; 31 L.Ed.2d 340 (1972) 13
Schneckloth v. Bustamonte, 412 U.S. 218; 93 S.Ct. 2041; 36 L.Ed.2d 854 (1973) 15
Smith v. Phillips, 455 U.S. 209; 102 S.Ct. 940; 71 L.Ed.2d 78 (1982) 23, 29
Strickland v. Washington, 466 U.S. 668; 104 S.Ct. 2052; 80 L.Ed.2d 674 (1984) 22
Trombley v. Anderson, 439 F. Supp. 1250 (E.D. Mich. 1977), affd 584 F.2d 807 (6th Cir. 1978) 22
United States ex rel Shaw v. DeRobertis, 755 F.2d 1279 (7th Cir. 1985) 19
United States v. Barbour, 813 F.2d 1232 (D.C. Cir. 1987) ... 26
United States v. Gonzalez-Vargas, 558 F.2d 633 (1st Cir. 1977) 19
United States v. Lamerson, 457 F.2d 371 (5th Cir. 1972) 19
United States v. Latimer, 511 F.2d 498 (10th Cir. 1975) 19
United States v. Leon, 534 F.2d 667 (6th Cir. 1976) 19
United States v. Toney, 527 F.2d 716 (6th Cir. 1975) 22
United States v. Whitmore, 480 F.2d 1154 (D.C. Cir. 1973) . 19

Constitutional Provisions

U.S. Const., Amend. V 2, 11
U.S. Const., Amend. VI 3, 20, 22, 26
U.S. Const., Amend. XIV 3, 11, 19, 22, 26

Statutes

28 U.S.C. §1257 2

Rules

M.C.R. 6.508(D) 28

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

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Petitioner,

vs.

STATE OF MICHIGAN,

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PETITION FOR A WRIT OF CERTIORARI
TO THE 6TH CIRCUIT COURT FOR
OAKLAND COUNTY, MICHIGAN

KEVIN ABELA, Petitioner, by and through his attorney, James S. Lawrence, moves this Court to issue a Writ of Certiorari to review a judgment of the 6th Circuit Court for Oakland County, Michigan, issued October 22, 1996.

OPINIONS BELOW

The order of the 6th Circuit Court for Oakland County, Michigan, of October 22, 1996 is attached in the Appendix. The order of the Michigan Court of Appeals of July 22, 1997 denying leave to appeal, and the order of the Michigan Supreme Court of May 28, 1998 denying leave to appeal, are also attached in the Appendix.

STATEMENT OF JURISDICTION.

This case began as a criminal prosecution in Oakland County, Michigan, Circuit Court. The original judgment was entered July 29, 1991. The ruling of the Circuit Court denying a Motion for Relief from Judgment was entered October 22, 1996. The order of the Michigan Court of Appeals was issued July 22, 1997. The final judgment of the Michigan Supreme Court was issued May 28, 1998. This Court has jurisdiction under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner Kevin Abela was convicted of manslaughter and CCW upon his trial for second degree murder and CCW in the death of Stanley Underwood. He was found not guilty of assaultive crimes where it was charged he assaulted prosecution witnesses Dan McAllister, Jerry Sullivan, and Jacob Sullivan. The trial and sentencing took place in Oakland County, Michigan, Circuit Court before the Hon. John N. O'Brien. On July 29, 1991, Petitioner was sentenced to prison for 7 to 15 years for manslaughter and a concurrent 3 years 4 months to 5 years for CCW.

An appeal of right raising different issues was denied by the Court of Appeals on July 22, 1994. Case No. 144005. The Michigan Supreme Court denied leave to appeal on March 31, 1995. Case No. 100783. The instant Motion for Relief from Judgment was filed August 14, 1996. On August 20, 1996, successor Judge John J. McDonald issued an order directing the

prosecutor to file an answer, which they did. On October 22, 1996, Judge McDonald issued a one page order denying the motion, not for any procedural shortcoming, but for lack of merit. The Court of Appeals denied leave to appeal on July 22, 1997. The Michigan Supreme Court denied leave to appeal on May 28, 1998.

FACTS CONCERNING THE INCIDENT

There was a party at the house of Al Howard on the evening of May 18 and early morning of May 19, 1990. (T June 11, 118). There was testimony of three fights, the last of which resulted in the death of Underwood. Petitioner claimed self-defense.

There was an incident outside (the first fight) where Jacob (JJ) Sullivan and Petitioner Abela had a fight, and JJ got a black eye. (T June 13, 199-201; T June 20, 81-86). Petitioner criticized JJ for trying to push a car where it would hit another car, that JJ threatened him, then shoved him, put him in a headlock, took him to the ground, and Petitioner fought back. (T June 20, 81-86). He then looked for his glasses, which were broken. (T June 20, 86, 92).

JJ ran in the house to complain. (T June 11, 187, 236; T June 13, 95). His brother Jerry Sullivan, on learning of the first fight, ran out of the house, accompanied by others, and attacked Petitioner Abela (the second fight). (T June 11, 121-126, 188-190, 215; T

June 13, 12, 98, 226, 268; T June 18, 64, 252-266; T June 20, 86-96).

Petitioner and Ron Wright left the party, but Ron Wright wanted to go back and get his coat which JJ Sullivan had. Petitioner Abela waited at a driveway down the street from the party, with a broken nose, and broken glasses. Suddenly several people who looked like blurs to him, because he was not wearing his glasses broken in the earlier fight, ran at him, attacked him, and had him on the ground. Stanley Underwood was on top of Petitioner. (T June 18, 45, 273). Petitioner was flattened to the ground by "all these people." He did not know who was on top of him, but he stabbed because he was seriously injured and afraid of greater injuries. Petitioner drew his knife, which he used at work, from a sheath on his belt. Petitioner stabbed upwards, resulting in the death of Underwood. Petitioner fled the scene, and turned himself in. (T June 11, 270-277; T June 18, 41-45, 66, 200, 252-253, 266-267: T June 20, 11, 99-110).

Police officers testified that they took Petitioner to the hospital, that he had broken bones in his face, and was treated in the emergency room. (T June 18, 202, 232). They found Petitioner's broken eyeglasses with blood on them. (T June 18, 79).

Prosecution witness Dan McAllister told police that when he got to the (third) fight it was already going on, and "everyone was piling on" Petitioner Abela. (T June 18, 294-296). McAllister testified in court that he saw the

whole third fight, and no one was piling on. (T June 18, 116-124). He broke his foot in the incident, but did not know whether he kicked Petitioner in the face. (T June 18, 130, 147). Jerry Sullivan admitted kicking Petitioner "several times" in the face during the third fight. (T June 13, 114, 191). Marty Semble, who did not know Petitioner or his companion Ron Wright (T June 18, 33) testified that the soon-to-be deceased, Stan Underwood, was on top of Petitioner hitting him. (T June 18, 44-45, 64). John Hunsanger also testified that Petitioner was on his back on the ground and the deceased was on top of Petitioner hitting him. (T June 11, 272-275).

Deputy Gary Murray testified that when he got to the party, people were trying to hide beer, and many people were drunk, including a 15 year old girl. (T June 18, 194). Deputy Michael McCabe also testified to the drunkenness of the partygoers. (T June 18, 229).

Dr. Ljubisa Dragovic did the autopsy of Stanley Underwood on May 19, 1990. He was 6' tall, 214 pounds with an athletic body, and about 22 years old. His blood alcohol level was .22. He had no illegal drugs in his system. (T June 11, 61, 76, 80). He died of stab wounds.

FACTS CONCERNING THE PETITIONER'S STATEMENT TO POLICE.

On May 1, 1991, the Court held a pretrial hearing about Petitioner's statements to police at the hospital and a few hours later at the police station.

Sgt. Michael McCabe testified that he went to the hospital at 4 a.m. and met Petitioner for the first time. (T May 1, 13). Petitioner was obviously injured. (T May 1, 21). The officer spoke to Petitioner for 20 to 30 minutes, and had no trouble understanding Petitioner, even though his speech was slow. (T May 1, 19).

According to Sgt. McCabe, before Petitioner made a statement, he said "Maybe I should talk to an attorney by the name of William Evans." (T May 1, 19). The officer agreed to call Evans, and Petitioner gave him Evans's card. (T May 1, 19-20). The officer then proceeded to read Petitioner his *Miranda* [1] rights, and Petitioner then agreed to and did make a statement. (T May 1, 20).

At the hospital, the Officer was of the opinion that Petitioner had been drinking. (T May 1, 26).

At 7:00 a.m., Petitioner was reinterviewed at the police station by Sgt. McCabe and Det. Cofu. Petitioner did not bring up the matter of an attorney. The officers did not reread the rights to the Petitioner. They did ask if Petitioner remembered them, and Petitioner said he did, and made another statement. (T May 1, 22). Det. Cofu testified that he saw Petitioner at the police station at 6:30 a.m., and Petitioner had numerous facial injuries at that time. (T May 1, 54). Petitioner appeared tired and uncomfortable. (T May 1, 56-57).

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[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

At the police station, Off. McCabe offered Petitioner food, but Petitioner said he was in no condition to eat. (T May 1, 23). During the taping of the Petitioner's statement, they had to stop the tape while Petitioner was throwing up blood and spit. (T May 1, 49). Petitioner also complained of being in pain. (T May 1, 51-52).

On the tape recording (played at both hearing and trial, but transcribed only during the trial) the officers ask Petitioner if he is ok, and he says no. They ask if he is going to get sick, and Petitioner says he does not know. (T June 18, 245). Petitioner says he is really tired and has not had much sleep. (T June 18, 245). The officers turn off the tape, then when they turn it back on, ask if Kevin is a little better now. (T June 18, 246).

Petitioner testified that he had had 6 12 ounce Budweiser Beers, and that he and two others split a fifth of schnapps and a fifth of Bacardi rum. He was intoxicated from the drinking, as well as medication the doctor had given him that evening at the hospital for pain. (T May 1, 83-86). The interrogation itself was in the hospital emergency room. (T May 1, 87).

Petitioner was in handcuffs until Off. McCabe began the interrogation. (T May 1, 92). At the time, Petitioner was in pain, nauseous, dizzy, and without his eyeglasses. He was spitting up blood. (T May 1, 93-95).

At the police station he felt even worse. He wanted to lie down and sleep. He was in extreme pain, tired and hungry, but could not eat or drink. He was cold, stripped

down to t-shirt, jeans and socks. He laid on the floor. When the officers came, he got into a chair for the interview. He had to lay his head on the table from time to time. (T May 1, 96-98). Indeed, after listening to the tape the judge found that the Petitioner was obviously in pain and dizzy. (T May 1, 119).

Petitioner testified that he did not hand a card to the officer, as he no longer had his wallet, and that he directed the officer to remove the card from his wallet. (T May 1, 89-90). He remembered the officer leaving the room before returning and beginning questioning. (T May 1, 91).

At the trial, prosecution witness Jerry Sullivan testified that he kicked Petitioner Abela quite a few times in the head and face. (T June 13, 114, 191). Prosecution witness Dan McAllister testified that he did not know whether he kicked Petitioner Abela in the face, but that he did break his foot in the incident. (T June 18, 130, 147).

During the closing argument at trial, the trial prosecutor described Petitioner as "pretty damn drunk." (T June 21, 47).

REASONS FOR GRANTING THE WRIT

QUESTION 1: WHETHER DEFENDANT'S STATEMENT TO POLICE WAS INVOLUNTARY AND INADMISSIBLE WHERE THE POLICE ADMITTED THAT WHEN THEY BEGAN QUESTIONING, DEFENDANT REQUESTED AN ATTORNEY.

Certiorari should be granted to determine precisely when a request for counsel must be honored by police during questioning. Under the testimony of the officer, it is clear that Petitioner requested an attorney, and that the officer, rather than ceasing questioning until a lawyer could be provided, proceeded to read Petitioner his rights and question him. Therefore, we submit that the statements of Petitioner to the officer were inadmissible.

The leading case on the subject is *Edwards v. Arizona*, 451 U.S. 477; 101 S.Ct. 436; 68 S.Ct. 378 (1981). In *Edwards*, the defendant was questioned, and asked for an attorney, and questioning ceased. However, the next day police returned and began questioning again, and Edwards answered. The Supreme Court held in *Edwards*, at 484, that the continuing of questioning after the defendant requested counsel violated his rights under the Fifth and Fourteenth Amendments, U.S. Const., Amend. V; U.S. Const., Amend. XIV:

> "An accused such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police."

Petitioner was in custody at the police station after being taken by officers to the hospital for treatment. Petitioner, before making any incriminating statement, requested to speak with an attorney. Off. McCabe admitted that rather than cease questioning, he continued to read the *Miranda* rights and question Petitioner Abela.

The only purpose of reading the *Miranda* rights was as part of the effort to continue with interrogation. The mere fact that Petitioner ultimately agreed to answer the questions does not change the fact that once he asked for the attorney, the police officer should have taken no steps to get him to proceed with asking questions or advising of rights, other than to get the attorney, which Off. McCabe admitted he did not do.

We submit the error was not harmless. This was not a statement about some extraneous matter. This was a lengthy statement providing detail about the incident

that led to the stabbing and Petitioner's own thoughts and actions before, during and after the stabbing.

Harmless error analysis was discussed in *People v. Anderson (After Remand)*, 446 Mich. 392 (1994). The Court held, 446 Mich. at 406, that under *Arizona v. Fulminante*, 499 U.S. 279; 111 S.Ct. 1246; 113 L.Ed.2d 302 (1991), the prosecution must prove beyond a reasonable doubt:

> "that there is no reasonable possibility that the evidence complained of might have contributed to the conviction."

In *Schneble v. Florida*, 405 U.S. 427; 92 S.Ct. 1056; 31 L.Ed.2d 340 (1972), the Court held that the court must reverse where "there is a reasonable probability that the improperly admitted evidence contributed to the conviction." 405 U.S. at 432.

Even though there was significant evidence by prosecution witnesses admitted about the circumstances of the incident, most of that evidence was contradicted by other prosecution witnesses, and much of it was of questionable credibility. Even more than the statement of a codefendant, the Petitioner's own statement is powerfully persuasive as to anything he may say against himself.

This Court should therefore grant certiorari and a new trial at which the Petitioner's statements to police made after he requested counsel shall not be admitted.

QUESTION 2: WHETHER DEFENDANT'S STATEMENT TO POLICE WAS INVOLUNTARY AND INADMISSIBLE WHERE DEFENDANT WAS SERIOUSLY INJURED AND UNDER THE INFLUENCE OF ALCOHOL AND PAIN MEDICATION GIVEN HIM BY THE DOCTOR.

The question is whether an injured defendant drugged by doctors in the hospital made a voluntary statement to police. This issue is of exceptional importance, as there are few reported United States Supreme Court cases that discuss facts such as those in this case. It is clear that in some instances a defendant's statement would be involuntary because of injuries and medication, yet, not every instance of injury or drug use will make a statement involuntary A clear standard is needed. Because questioning of defendants is an important regular feature of American police practices, there is need for guidance from this Court as to what is permitted and what is not.

We submit that the condition of the Petitioner was such that his statements in response to custodial questioning clearly were involuntary and inadmissible.

The prosecution has the burden of proof on the issue of voluntariness of a defendant's statement to police. *Lego v. Twomey*, 404 U.S. 477, 489; 92 S.Ct. 619; 30 L.Ed.2d 618 (1972). The totality of circumstances are to be considered in determining whether defendant's

confession was involuntary. *Brown v. Illinois*, 422 U.S. 590; 95 SCt 2254; 45 LEd2d 416 (1975); *Schneckloth v. Bustamonte*, 412 U.S. 218; 93 S.Ct. 2041; 36 L.Ed.2d 854 (1973); *People v. Cipriano*, 431 Mich. 315 (1988).

In *People v. Cipriano*, the Court mentioned certain factors that would bear on the question of voluntariness, such as "the repeated and prolonged nature of the questioning...whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused."

The record is clear that Kevin Abela had been repeatedly kicked in the head and face (though not by police) to the extent that police sought medical treatment for him. He had been drinking extensively, and was given pain medication by the doctor. According to the officers, he was in pain, and spitting up blood. He was questioned for hours after he requested an attorney. During the taped interview, he complained of being tired. Petitioner had worked all day, been out drinking, and was up all night. Although hungry, he was physically unable to eat.

We submit that under these circumstances, the statement to police was not voluntary. Petitioner's testimony adds further support, in that he said he tried to lie down, but had to sit in a chair for the interview, and even during the interview repeatedly laid his head down

on the table. However, even under the officers' testimony and the tape recording the involuntariness is clear.

An involuntary or coerced confession is inadmissible either as direct evidence or for impeachment purposes. *Mincey v. Arizona*, 437 U.S. 385; 98 SCt 2408; 57 LEd2d 290 (1978). The issue of harmfulness of the error is discussed in Issue I, which we incorporate here.

It is manifestly unjust to base a conviction on a statement extracted from a defendant under conditions tantamount to torture. *Brown v. State of Mississippi*, 297 U.S. 278; 56 S.Ct. 461; 80 L Ed 682 (1936). There was a time when there was a Supreme Court that would not tolerate such a thing: 1936. Hopefully, that time is not past.

This Court should grant certiorari to determine the extent to which the Petitioner's statements to police while he was injured, drunk, drugged, in pain, spitting up blood, up all night and tired, shall be ruled involuntary and not be admitted.

QUESTION 3: WHETHER THE PROSECUTOR UNFAIRLY PREJUDICED DEFENDANT BY MAKING UP FACTS IN HIS ARGUMENT.

Claims of improper prosecutor argument are not rare. Because instances of improper argument continue

to occur, despite past warnings from this court, guidance from this Court would be helpful.

During the closing argument, the prosecutor could not resist the temptation to invent a conversation between Petitioner Abela and separately tried codefendant Ronald Wright that does not appear in the testimony of any witness.

Prosecutor Charles Spiekerman said (T June 21, 47):

> "Do you think when they got back to that car they were made as hell? Both of them got shot down, pretty damn drunk, they are pretty pissed off. They've lost the fight. They've been thrown out. They've been humiliated. They've been embarrassed.
>
> **Not only that, Ron Wright says, "My damn coat's back there. Let's go get it." "Ronnie, better take this when we go back. Ain't nobody going to kick our ass anymore. Let's go back."**
>
> [emphasis added]

When the prosecutor said "Ronnie, better take this when we go back," he clearly meant that it was Petitioner Kevin Abela who said that, and that "take this" referred to giving Ron Wright a knife.

Kevin Abela testified that after his nose was broken in the second fight (the stabbing occurred during the third fight), he walked back to his car. (T June 20, 94). It was his intention to leave. (T June 20, 98). Then Ron Wright said he was going back to get his coat. (T June 20, 99). Ron got out of the car, and Petitioner stayed there for a few seconds, and got out of the car. At the time, Kevin's glasses were broken. (T June 20, 100). He walked to the driveway of a different house to wait for Ron, when a group of people came after him. (T June 20, 100-101).

In his recorded statement (which we argue to suppress in Issues I and II) Kevin said that he had given Ron a knife, but that it was earlier in the evening, before they ever went to the party. (T June 18, 259-260).

No person ever testified that Petitioner Abela made a decision to go back to the party (in fact, the attack on Kevin Abela that led to the stabbing occurred down the street from the party). No person ever testified that Kevin gave Ron Wright a knife at the time Ron decided to go back, for the purpose of making sure that "Ain't nobody going to kick our ass anymore." No person testified that the knife was handed over at that time, or with the stated intent.

The prosecutor's argument was not based on the record. The alleged statement of Petitioner planning an attack appear nowhere in the testimony. It was an invention designed to add to the case against Kevin

Abela. It had the intended effect; instead of a finding of self-defense, the jury found manslaughter.

A conviction should be reversed where prejudicial and improper argument by the prosecutor has the effect of denying the defendant a fair trial. It is improper and a denial of due process for the prosecutor to argue facts not in evidence. *Berger v. United States*, 295 U.S. 78; 55 S.Ct. 629; 79 L Ed 1314 (1935); *United States v. Leon*, 534 F.2d 667, 679 (6th Cir. 1976); *United States ex rel Shaw v. DeRobertis*, 755 F.2d 1279 (7th Cir. 1985); *United States v. Latimer*, 511 F.2d 498 (10th Cir. 1975), *United States v. Whitmore*, 480 F.2d 1154 (D.C. Cir. 1973), *United States v. Gonzalez-Vargas*, 558 F.2d 633 (1st Cir. 1977); *United States v. Lamerson*, 457 F.2d 371 (5th Cir. 1972); U.S. Const., Amend. XIV.

Here, as in *United States ex rel Shaw v. DeRobertis*, 755 F.2d at 1281, "The prosecutor violated the fundamental rule, known to every attorney, that argument is limited to the facts in evidence."

For the prosecutor to provide the jury with information that the witnesses did not provide the jury is for the prosecutor to unlawfully assume the role of witness. *Berger v. United States*, supra. Because the Petitioner cannot cross-examine a prosecutor who does not take the stand, such actions by the prosecutor violate the fundamental right of cross-examination. The right of a defendant to cross-examine the witnesses against him is recognized under the U.S. constitution as being the

most fundamental of rights. U.S. Const., Amends VI, XIV; *Davis v. Alaska*, 415 U.S. 308; 94 S.Ct. 1105; 39 L.Ed.2d 347 (1974); *Lee v. Illinois*, 476 U.S. 530; 106 S.Ct. 2056; 90 L.Ed.2d 514 (1986)).

Under Michigan law, because of manifest injustice Petitioner was not foreclosed from review even though his attorney failed to object. M.R.E. 103(d); *People v. Fisher*, 193 Mich. App. 284 (1992); *People v. Ellison*, 133 Mich. App. 814 (1984); *People v. Sterling*, 154 Mich. App. 223 (1986); *People v. Rosales*, 160 Mich. App. 304 (1987); *People v. Strong*, 404 Mich. 357, 363 (1978).

It is manifestly unjust to convict Petitioner of a crime on the suggestion of facts not supported by the evidence. As the Supreme Court explained in *Berger*, a lawyer representing the government is more than just a lawyer; he is a representative of the sovereign, **"Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."**

The harmfulness of the error is especially evident when we consider the case of *People v. Fisher*, supra. The Court held the prosecutor's comments to be reversible error **despite the lack of objection**, holding that "A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence in the case."

The recent ruling in *People v. Budzyn*, 456 Mich. 77 (1997) gives additional support to this issue. In *Budzyn*, the Michigan Supreme Court reversed a conviction for a new trial where extraneous influence was brought to bear on the jury: "Where the jury considers extraneous facts not introduced in evidence, this deprives a defendant of his rights of confrontation, cross-examination, and assistance of counsel embodied in the Sixth Amendment." A prima facie case is made where "the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict."

We submit that the improper argument, which brought matters to the jury not found in the testimony, was an extraneous influence. It clearly dealt directly with a major issue in the case. Reversal is required where the error is not harmless. Because Petitioner had a plausible self-defense claim, and the prosecutor's statements invented a conversation where Petitioner planned an attack, the effect of the extraneous influence on the willingness of the jury to accept the self-defense claim cannot be harmless error.

This issue should be considered because of the importance of the issue, and because of ineffective assistance of counsel, as discussed in another issue. Petitioner should have a new trial at which the prosecutor shall not give the jury reasons to convict Abela which arise from the imagination of the prosecutor.

QUESTION 4: WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING TO THE IMPROPER ARGUMENT.

We submit that it was ineffective assistance of counsel for the attorney not to object to the highly objectionable prosecutor argument complained of in Issue III.

A criminal defendant is entitled to the effective assistance of counsel at trial. *Strickland v. Washington*, 466 U.S. 668; 104 S.Ct. 2052; 80 L.Ed.2d 674 (1984); *Beasley v. United States*, 491 F.2d 687 (6th Cir. 1974); U.S. Const., Amend. VI, XIV.

If the attorney makes a serious mistake which could affect the verdict, reversal is required even if the attorney was generally competent. As stated in *Trombley v. Anderson*, 439 F. Supp. 1250, 1256 (ED Mich. 1977), affd 584 F.2d 807 (6th Cir. 1978):

> "In *United States v. Toney*, 527 F.2d 716 (6th Cir. 1975) the court indicates the focal issue is whether or not the actions of defense counsel could have changed the verdict."

It is not just whether the actions "could have changed the verdict," but in any way "could have changed" the outcome of the case. The critical failure of an attorney to object can be ineffective assistance of

counsel if it deprives the defendant of an opportunity for dismissal of the case or for success on appeal. *Kowalak v. United States*, 645 F.2d 534, 537-538 (6th Cir. 1981); *Corsa v. Anderson*, 443 F. Supp. 176 (E.D. Mich. 1977).

Petitioner requested in state court an evidentiary hearing on ineffective assistance of counsel. *People v. Ginther*, 390 Mich. 436 (1973). The state courts wrongly refused.

The U.S. Supreme Court has stated a preference for determining disputed factual issues by way of a live hearing rather than by employing speculation or presumption. *Smith v. Phillips*, 455 U.S. 209, 215-216; 102 S.Ct. 940; 71 L.Ed.2d 78 (1982); *Rushen v. Spain*, 464 U.S. 114, 119-120; 104 S.Ct. 453; 78 L.Ed.2d 267 (1983). We submit it should be determined whether this "preference" is constitutionally based, as we claim it to be.

This Court should grant certiorari not only concerning the ineffective assistance of counsel, but concerning the failure to provide an evidentiary hearing.

QUESTION 5: WHETHER APPELLATE COUNSEL WAS INEFFECTIVE, WHERE HE DID NOT ORDER A RELEVANT TRANSCRIPT, AND WAS THUS HAD NO RECORD AND PRESENTED NO ARGUMENT CONCERNING THE MOST IMPORTANT ISSUES IN THE CASE.

This issue is of exceptional importance because of the ruling in *Jones v. Barnes*, 463 U.S. 745, 752, 103 S.Ct. 3308, 3313, 77 L.Ed.2d 987 (1983). Many courts, including Michigan, have taken this case to mean that counsel can almost never be deemed ineffective on appeal. See, e.g., *People v. Reed*, 449 Mich. 375 (1995). We submit that where there is a failure to get records needed to do a complete job on appeal, that causes the attorney to miss important issues because not contained in his portion of the record, there has been ineffective assistance of appellate counsel and prejudice.

While attorney Young did raise plausible issues for the appeal, he did not raise any issue regarding the Petitioner's statement to police. This was in spite of the fact that the issue was hotly contested in the trial court, was the subject of an extensive evidentiary hearing, and the case law strongly supported the issue. Further, raising the issue would not conflict with or adversely affect the other issues raised.

This inaction by the attorney would seem incomprehensible, except for a fact later uncovered. As shown by affidavit, Lawrence Abela, brother of Petitioner Kevin Abela, picked up the file from attorney Young and brought it to present counsel, attorney James Lawrence. As shown by the affidavits presented to the state courts, when I examined the file, I discovered that it did not contain the transcript of the *Walker* hearing (hearing on admissibility of Petitioner's statement to police) of May 1,

1991. [2] Similarly, Lawrence Abela made a list of the transcripts he received, and the transcript in question was not among them. The extensive proceedings, testimony, argument and rulings contained in that transcript were apparently not available to attorney Young, which would explain why this otherwise-competent attorney would fail to raise highly meritorious, fully preserved and extensively argued issues.

It would appear that through some sort of oversight attorney Young never got the transcript of May 1, 1991 or September 12, 1990. Either the transcript was never ordered by him, or, although ordered, was never received, and apparently there was no follow-up to learn that transcripts were missing, and what the contents of the transcripts were. Yet, no evidentiary hearing was ever held.

We claim that this regrettable situation shows ineffective assistance of appellate counsel, and therefore shows good cause for failure to raise in the appeal of right issues based on the missing transcripts, specifically, Issue I and II. We also claim that there was ineffective

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[2] Present counsel had to read the transcript in the Record Retention area in the basement of the Oakland County Courthouse to learn of its contents. The transcript of September 12, 1990, was also not in Mr. Young's file as received by present counsel, and I had to read that at Record Retention as well. These facts are presented by way of affidavit.

assistance of appellate counsel for failure to raise Issue III and IV regarding improper prosecutor argument and ineffective assistance of counsel.

A criminal defendant is entitled to the effective assistance of counsel on appeal. *Evitts v. Lucey*, 469 U.S. 387; 105 S.Ct. 830; 83 L.Ed.2d 821 (1985); *Penson v. Ohio*, 488 U.S. 75; 109 S.Ct. 346; 102 L.Ed.2d 300 (1988); U.S. Const., Amend. VI; U.S. Const., Amend. XIV.

In *Beasley v. United States*, 491 F.2d 687 (6th Cir. 1974), the Court stated that, to be constitutionally adequate:

> "Defense counsel must investigate all apparently substantial defenses available to the Petitioner and must assert them in a timely manner."

Courts have repeatedly held that the failure of the appeal attorney to do adequate investigation, including the failure to get the full transcripts of the lower court proceedings, is ineffective assistance of counsel. See *United States v. Barbour*, 813 F.2d 1232 (D.C. Cir. 1987); *Neally v. Cabana*, 764 F.2d 1173, 1178 (5th Cir. 1985); *House v. Balkcom*, 725 F.2d 608, 617-618 (11th Cir. 1984); *Crisp v. Duckworth*, 743 F.2d 580, 583 (7th Cir. 1983).

We submit that failure to investigate what happened in Court on May 1, 1991, when the evidentiary hearing was held, was ineffective assistance of counsel under *Beasley*. Counsel could not exercise professional judgment over issues of which he was unaware because he failed to get the transcripts necessary to learn of the issues and determine whether to raise them.

This Court requires that appellate lawyers must function at a level of objectively reasonable performance. *Jones v. Barnes*, supra. It would appear that counsel did not even know about the *Walker* hearing and the testimony about Petitioner asking for a lawyer, and being injured, drunk, drugged, in pain, spitting up blood, up all night and tired at the time he made the statement, for otherwise, what possible explanation could there be for not raising the issue?

In *Mason v. Hanks*, 97 F.3d 887, 893 (7th Cir. 1996), the Court held:

> "'Were it legitimate to dismiss a claim of ineffective assistance of counsel on appeal solely because we found it improper to review appellate counsel's choice of issues, the right to effective assistance of counsel on appeal would be worthless.' [citing to *Gray v. Greer*, 800 F.2d 644 (7th Cir. 1986)] Instead, we engage in a pragmatic assessment of appellate counsel's work...

> [W]hen appellate counsel omits (without legitimate strategic purpose) 'a significant and obvious issue' we will deem his performance deficient [citing to *Gray v. Greer* and *Hollenback v. United States*, 987 F.2d 1272 (7th Cir. 1993)] and when that omitted issue 'may have resulted in a reversal of the conviction, or an order for a new trial,' we will deem the lack of effective assistance prejudicial...
>
> The ultimate question we ask is 'whether, but for counsel's errors, there is a reasonable probability that the outcome of the proceeding ... would have been different.'"

We submit this Court should adopt the standard of *Mason v. Hanks*. There is a reasonable probability that if the attorney had had the *Walker* hearing transcript he would have raised the well-preserved issue and there is a reasonable probability that the outcome of the appeal would have been different. The remedy for ineffective assistance of counsel is a new appeal. *Evitts v. Lucey*, supra.

Ineffective assistance of appellate counsel is "good cause" for failing to raise an issue in the appeal of right. *Murray v. Carrier*, 477 U.S. 478, 488; 106 S.Ct. 2639; 91 L.Ed.2d 397 (1986); M.C.R. 6.508(D). Unavailability of

documents to the defense is "good cause" for not raising an issue in the appeal of right. *Amadeo v. Zant*, 486 U.S. 214, 222; 108 S.Ct. 1771; 100 L.Ed.2d 249 (1988).

If the issues had been raised, the result of the appeal may well have been different. In this case, the issues not raised in the earlier appeal are highly meritorious and may well change the result, if they can get consideration on their merits. *Mason v. Hanks*, supra.

The U.S. Supreme Court has stated a preference for determining disputed factual issues by way of a live hearing rather than by employing speculation or presumption. *Smith v. Phillips*, 455 U.S. 209, 215-216; 102 S.Ct. 940; 71 L.Ed.2d 78 (1982); *Rushen v. Spain*, 464 U.S. 114, 119-120; 104 S.Ct. 453; 78 L.Ed.2d 267 (1983). We submit it should be determined whether this "preference" is constitutionally based, as we claim it to be.

This Court should grant certiorari not only concerning the ineffective assistance of counsel, but concerning the failure to provide an evidentiary hearing.

CONCLUSION

Petitioner Kevin Abela respectfully submits that for the reasons stated above, this Court should grant the Writ of Certiorari and grant either plenary consideration or summary reversal.

Respectfully submitted,

JAMES STERLING LAWRENCE (P33664)
Attorney for Petitioner Abela
One Kennedy Square, Suite 500
Detroit, MI 48226
(313) 965-4189

Dated: July 31, 1998

STATE OF MICHIGAN

IN THE OAKLAND COUNTY CIRCUIT COURT

PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff,

v CR 90-101083-FC

KEVIN MARK ABELA,

Defendant.

ORDER RE: POST-CONVICTION RELIEF

Defendant has filed a motion seeking post-conviction relief.

This Court has reveiwed Defendant's pleadings and the applicable law.

Pursuant to MCR 2.119(E)(3), the Court dispensed with oral argument.

Defendant's motion is:

____ taken under advisement and the Court will issue a written opinion.

____ denied because Defendant has not followed proper procedure

xxxxxxxxxx denied for lack of merit on the grounds presented.

____ granted.

Dated: OCTOBER 22, 1996 /s/ John J. McDonald
JOHN J. MCDONALD
CIRCUIT JUDGE

Court of Appeals, State of Michigan

ORDER

People of MI v
Kevin Mark Abela

Docket # 200930

L.C. # 90-101083 FC

Janet T. Neff
Presiding Judge

Donald E. Holbrook, Jr.
Joel P. Hoekstra
Judges

The Court orders that the Delayed Application for Leave to Appeal is DENIED for lack of merit in the grounds presented.

The motion to remand is DENIED.

[SEAL]

A true copy entered and certified by Ella Williams, Chief Clerk on
JUL 22 1997 /s/ Ella Williams

Order

Michigan Supreme Court
Lansing. Michigan

Entered: May 28, 1998

110260

Conrad L. Mallett, Jr.
Chief Justice
James H. Brickley
Michael F. Cavanagh
Patricia J. Boyle
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Justices

PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellee,
v
KEVIN MARK ABELA,

Defendant-Appellant.

SC: 110260
COA: 200930
LC: 90-101083-FC

On order of the Court, the delayed application for leave to appeal is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

E0519
[SEAL]

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certifiy that the foregoing is a true and complete copy of the order entered at the direction of Court.

May 28, 1998

/s/ Jacqueline B. McKinnon
Deputy Clerk